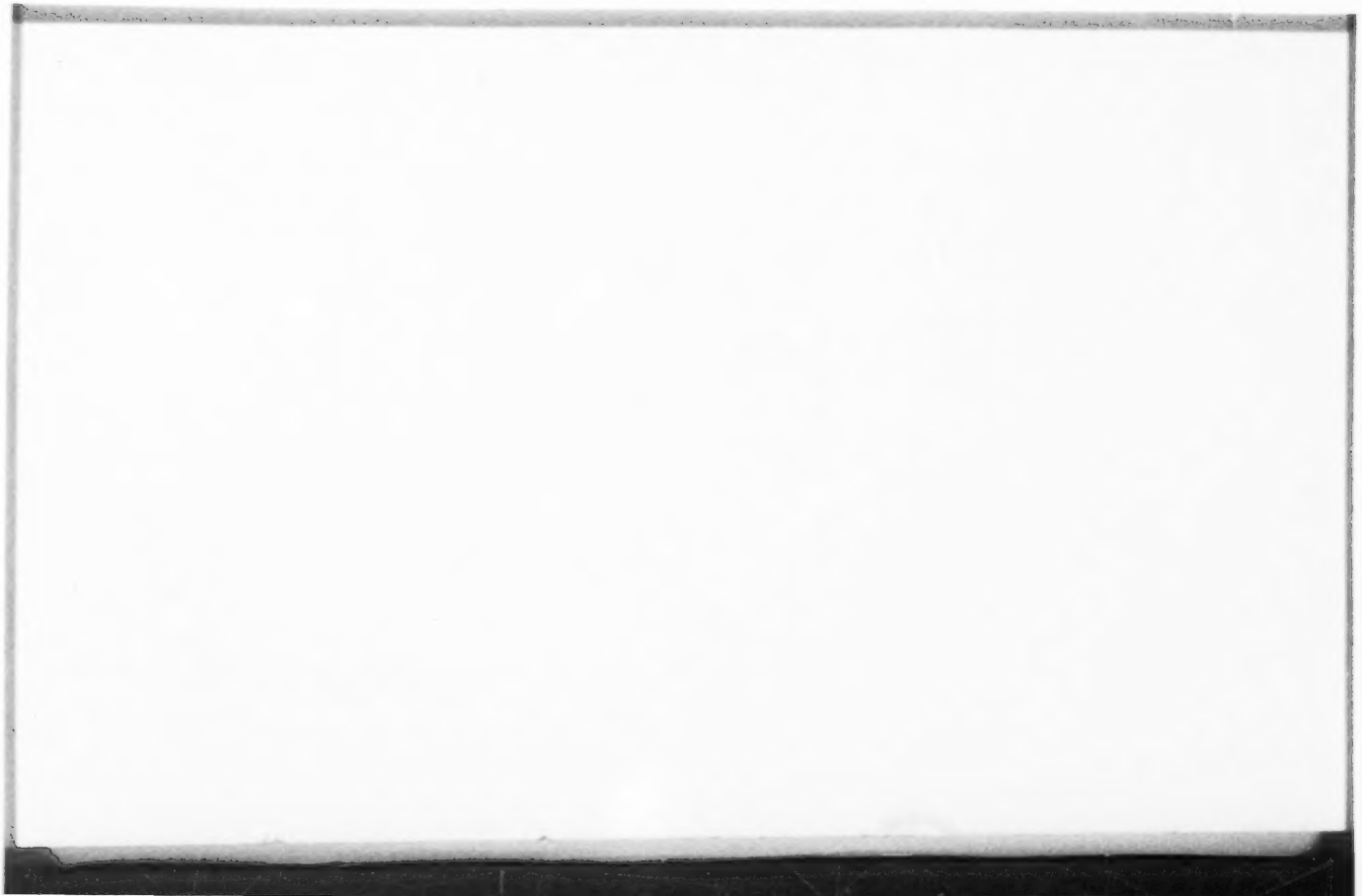


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In the Supreme Court of the United States.

OCTOBER TERM, 1902.

JOHNSON BLACKFEATHER, PRINCIPAL CHIEF of the Shawnee Indians, appellant,
v.
THE UNITED STATES.
} No. 276.

APPEAL FROM THE COURT OF CLAIMS.

BRIEF FOR THE UNITED STATES.

WILLIAM H. BUTTON,
Special Attorney.

LOUIS A. PRADT,
Assistant Attorney-General.

In the Supreme Court of the United States.

OCTOBER TERM, 1902.

JOHNSON BLACKFEATHER, PRINCIPAL CHIEF, etc., appellant,
v.
THE UNITED STATES.

No. 276.

BRIEF FOR UNITED STATES.

STATEMENT.

The petition in this case was filed August 3, 1892, and the United States demurred on the ground that it appears from the petition that the Court of Claims had no jurisdiction of the action, and because the petition fails to state facts enough to constitute a cause of action against the United States. The Court of Claims sustained the demurrer on the ground that the petition does not state a cause of action, and entered judgment accordingly. This is an appeal by the claimant from such judgment.

The following facts appear from the petition:

Johnson Blackfeather is the principal chief of the Shawnee Indians. He brings this suit as such chief under the provisions of an act of Congress approved in 1890, which is attached to and made a part thereof

as "Exhibit A," and under a supplemental act, approved July 6, 1892, attached to and made a part of said petition as "Exhibit B."

Said acts are as follows:

EXHIBIT A.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That full jurisdiction is hereby conferred upon the Court of Claims, subject to an appeal to the Supreme Court of the United States as in other cases, to hear and determine what are the just rights in law or in equity of the Shawnee and Delaware Indians, who are settled and incorporated into the Cherokee Nation, Indian Territory, east of ninety-six degrees west longitude, under the provisions of article fifteen of the treaty of July nineteenth, eighteen hundred and sixty-six, made by and between the United States and the Cherokee Nation, and articles of agreement made by and between the Cherokee Nation and the Shawnee Indians, June seventh, eighteen hundred and sixty-nine, approved by the President June ninth, eighteen hundred and sixty-nine, and articles of agreement made with the Delaware Indians April eighth, eighteen hundred and sixty-seven; and also of the Cherokee freedmen, who are settled and located in the Cherokee Nation under the provisions and stipulations of article nine of the aforesaid treaty of eighteen hundred and sixty-six in respect to the subject-matter herein provided for.

SEC. 2. That the said Shawnees, Delawares, and freedmen shall have a right, either sepa-

rately or jointly, to begin and prosecute a suit or suits against the Cherokee Nation and the United States Government to recover from the Cherokee Nation all moneys due, either in law or equity, and unpaid to the said Shawnees, Delawares, or freedmen, which the Cherokee Nation have before paid out, or may hereafter pay, per capita, in the Cherokee Nation, and which was, or may be, refused to or neglected to be paid to the said Shawnees, Delawares, or freedmen by the Cherokee Nation out of any money or funds which have or may be paid into the treasury of, or in any way have come, or may come, into the possession of the Cherokee Nation, Indian Territory, derived from the sale, leasing, or rent for grazing purposes on Cherokee lands west of ninety six degrees west longitude, and which have been, or may be, appropriated and directed to be paid out per capita by the acts passed by the Cherokee council, and for all moneys, lands, and rights which shall appear to be due to the said Shawnees, Delawares, or freedmen under the provisions of the aforesaid articles of the treaty and articles of agreement.

SEC. 3. That the said suit or suits may be brought in the name of the principal chief or chiefs of the said Shawnee and Delaware Indians, and for the freedmen, and in their behalf and for their use in the name of some person as their trustee, to be selected by them with the approval of the Secretary of the Interior. And the exercise of such jurisdiction shall not be barred by any lapse of time heretofore, nor shall the rights of such Indians be impaired by any acts passed and improved by the Cherokee

national council. Suits may be instituted within twelve months after the passage of this act, and the law and practice and rules of procedure in such courts shall be the practice and law in these cases; and copies of the petitions filed in the case at the commencement of the suit shall be served upon the Attorney-General of the United States and on the principal chief of the Cherokee Nation by the marshal of the district court for the Indian Territory; and that the costs of the said suits shall be apportioned between the United States and the other parties to such suits as to said court law and equity shall require. The Attorney-General shall designate and appoint from the Department of Justice a person who is competent to defend the said Cherokee Nation and the United States. And the said Shawnees, Delawares, and freedmen may be represented by attorneys and counsel. And the court is hereby authorized to decree the amount of compensation of such attorneys and counsel fees, not to exceed ten per centum of the amount recovered, and order the same to be paid to the attorneys and counsel of the said Shawnees, Delawares, and freedmen; and all judgments for any sum or sums of money which may be ordered or decreed by such court in favor of the Shawnees, Delawares, or freedmen, and against the Cherokee Nation, shall be enforced by the said court or courts against the said Cherokee Nation by execution, mandamus, or in any other way which the said court may see fit.

SEC. 4. That the said Shawnee Indians are hereby authorized and empowered to bring and

begin a suit in law or equity against the United States Government in the Court of Claims, to recover and collect from the United States Government any amount of money that in law or equity is due from the United States to said tribes in reimbursement of their tribal fund for money wrongfully diverted therefrom. The right to appeal, jurisdiction of the court, process, procedure, and proceedings in the suit here provided for shall be as provided for in sections one, two, and three of this act.

Approved October 1, 1890.

Exhibit B.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Shawnee tribe or band of Indians, whose claims and demands against the Cherokee Nation and the United States were referred to the United States Court of Claims for adjudication under the act of Congress passed and approved October first, eighteen hundred and ninety, entitled "An act to refer to the Court of Claims certain claims of the Shawnee and Delaware Indians and the freedmen of the Cherokee Nation, and for other purposes," shall present to the said court all their claims against the United States and the Cherokee Nation, or against either or both of them, of every description whatsoever, arising out of treaty relations with the United States, rights growing out of such treaties, and from contracts expressed or implied, under such treaties, made and entered into by and between

the said Shawnees and Cherokees, and between them, or either of them, and the United States.

Approved July 6, 1892.

The petition states that the purpose of the action is—

> To recover and collect from the United States Government the several respective and aggregate amounts of money herein alleged and set out in payment for the destruction, loss, forcibly taking, carrying, and driving away live stock, farm products, household goods, money, and other personal property of divers description and kinds, belonging to, and possessed by, and the property of the said Shawnee Indians, by white United States citizens and soldiers in the State of Kansas and the Indian Territory at divers times and places in the year 1861 and all the time up to and including the year 1866, as more fully appears in the following descriptive list or schedule.

The petition sets forth a schedule containing the names of a large number of individual claimants, together with the description of property taken from each and the value thereof, amounting in the aggregate to the sum of $530,945.14. It is further stated that the claims arise out of treaty relations with the United States, to wit, out of articles 11 and 14 of the treaty of May 10, 1854, and from the Statutes U. S. R. S., sec. 2154 and sec. 2155, all of which sections are set forth in "Exhibit C" and made a part of said petition.

Said sections are as follows:

> ARTICLE 11. It being represented that many of the Shawnees have sustained damage and

loss and destruction of their crops, stock, and other property, and otherwise, by reason of the great emigration which has for several years passed through their country, and of other causes, in violation, as they allege, of guarantees made for their protection by the United States, it is agreed that there shall be paid in consideration thereof, to the Shawnees, the sum of twenty-seven thousand dollars, which shall be taken and considered in full satisfaction not only of such claim but of all others of what kind soever, and in release of all demands and stipulations arising under former treaties, with the exception of the perpetual annuities amounting to three thousand dollars, hereinbefore named, and which are set apart and appropriated in the third article hereof. All Shawnees who have sustained damages by the emigration of citizens of the United States, or by other acts of such citizens, shall, within six months after the ratification of this treaty, file their claims for such damages with the Shawnee agent, to be submitted by him to the Shawnee council for their action and decision, and the amount in each case approved shall be paid by the said agent: *Provided*, The whole amount of the claims thus approved shall not exceed the said sum stipulated for in this article: *And provided*, That if such amount shall exceed the sum, then a reduction shall be made *pro rata* from each claim until the aggregate is lowered to that amount. If less than that amount be adjudged to be due, the residue, it is agreed, shall be appropriated as the council shall direct.

ARTICLE 14. The Shawnees acknowledge their dependence on the Government of the United States, and invoke its protection and care. They will abstain from the commission of depredations, and comply, as far as they are able, with the laws in such cases made and provided, as they will expect to be protected and to have their rights vindicated.

Revised Statutes, section 2154, which is the act of June 30, 1834 (4 Stats., p. 731):

> Whenever, in the commission, by a white person, of any crime, offense, or misdemeanor, within the Indian country, the property of any friendly Indian is taken, injured, or destroyed, and a conviction is had for such crime, offense, or misdemeanor, the person so convicted shall be sentenced to pay such friendly Indian to whom the property may belong, or whose person may be injured, a sum equal to twice the just value of the property so taken, injured, or destroyed.

Revised Statutes, section 2155, which is the act of June 30, 1834 (4 Stat., p. 731):

> If such offender shall be unable to pay a sum at least equal to the just value or amount, whatever such payment shall fall short of the same shall be paid out of the Treasury of the United States. If such offender can not be apprehended and brought to trial, the amount of such property shall be paid out of the Treasury. But no Indian shall be entitled to any payment out of the Treasury of the United States for such property if he, or any of the nation to

> which he belongs, have sought private revenge or have attempted to obtain satisfaction by any force or violence.

It is further stated that all the property claimed was taken after the treaty of May 10, 1854, was entered into; that said Indians at the time were in amity with, and have always been loyal to, the United States.

The petition prays that judgment be entered in favor of the individuals mentioned, for the respective sums set opposite their names, and that 10 per cent of said amounts be allowed the attorneys for their services.

ARGUMENT.

THE COURT OF CLAIMS HAD NO JURISDICTION.

It is evident that the Court of Claims has no jurisdiction in said suit, unless it is by virtue of the acts of 1890 and 1892, above quoted. All of these claims arose between 1861 and 1866, and are, of course, long since barred by the statute of limitations, unless such bar is removed by the acts mentioned. (U. S. R. S., 1069.) This bar of the statute of limitations appears on the face of the petition, and under the well-known principles of procedure that govern the Court of Claims it is unnecessary that the statute be taken advantage of by plea. In the case of *Finn* v. *United States* (123 U. S., 227), this court stated, at page 232:

> The general rule that limitation does not operate by its own force as a bar, but is a defense, and that the party making such a defense must plead the statute if he wishes the benefit of its provisions has no application to suits in

> the Court of Claims against the United States. An individual may waive such a defense, either expressly or by failing to plead the statute; but the Government has not expressly or by implication conferred authority upon any of its officers to waive the limitation imposed by statute upon suits against the United States in the Court of Claims. Since the Government is not liable to be sued, as of right, by any claimant, and since it has assented to a judgment being rendered against it only in certain classes of cases, brought within a prescribed period after the cause of action accrued, a judgment in the Court of Claims for the amount of a claim which the record or evidence shows to be barred by the statute would be erroneous.

Unless it is by virtue of the two acts mentioned the suit is also barred by R. S. sec. 1066. In fact the appellant states that his action is based upon the acts of 1890 and 1892. It therefore becomes necessary to consider whether or not these two acts contain authority for the bringing of this suit. It will be noticed that this action is not brought to recover any sums that are due to the Shawnee Tribe of Indians as a tribe, but is brought to recover amounts due to individual Indians.

The first section of the act of 1890 provides that the Court of Claims shall have jurisdiction to determine the rights of the Shawnee and Delaware Indians under certain articles in the treaties of *July 19, 1866*, *July 7, 1869*, and *April 8, 1867*.

It is evident that the suit can not be maintained

under this section because it is confined to certain treaties, of which the treaty of 1854, under which this action is brought, is not one.

In section 2 it is provided that the Shawnees, Delawares, and Freedmen may prosecute a suit against the Cherokee Nation and the United States to recover from the Cherokee Nation certain sums which that nation did not pay to such tribes under the provisions of the treaties mentioned in section 1 of the act. It is evident that this suit can not be maintained under this section, as it allows nothing but a recovery against the Cherokee Nation.

Section 3 prescribes the method of procedure to be pursued in said suit, and emphasizes the fact that the act was intended to give the right of action to the tribes of Shawnees and Delawares, as such, as it provides that the suit may be in the name of the principal chiefs of said Indians.

Section 4 of the act provides that the Shawnee Indians may bring suit against the United States to recover money due from the United States "in reimbursement of their tribal fund." It is evident that this suit can not be maintained under this section, as it is not a suit for reimbursement of tribal funds. Consequently the suit can not be brought under the act of 1890.

The act of 1892 was evidently intended to extend the rights of action provided for in the act of 1890 to those which arose under any treaty and not confine them to the treaties mentioned in the act of 1890. It

does not, however, seem to be intended to allow suits on behalf of individuals, but to allow such suits only as could be brought in favor of the tribes as such.

In the first place, this is evident from the description of those who are authorized to bring suit by the act of 1892. It is stated that the Shawnee tribe or band of Indians shall present all their claims to the Court of Claims. It is not provided, however, that any individuals of this tribe shall have that privilege.

In the next place, there is a clause which qualifies the meaning of the "Shawnee tribe or band of Indians." The clause describes that tribe or band of Indians as those

> whose claims or demands against the Cherokee Nation and the United States were referred to the United States Court of Claims for adjudication under the act of Congress passed and approved October 1, 1890.

It has already been pointed out that the claimants whose claims were referred to the Court of Claims by the act of 1890 were strictly confined to the various tribes and bands of Indians as such. Consequently, when it is specified in this act that the claimants are the same as the claimants whose claims were referred by the former act, it is evident that it was not intended that any others should be entitled to bring suit under the second act than those entitled under the first.

The object of the act of 1892 was to enlarge the number of treaties which could be litigated by the tribes of Indians, and the act evidently had no other purpose.

That this is the meaning of the act of 1892 has been intimated by this court. Under this act several suits were brought, and among others one which came to this court, and which is reported under the title of *United States* v. *Blackfeather* (155 U. S., 180). In that suit it was sought to recover a large amount of money due this same tribe of Shawnee Indians for lands which had been sold by the United States. There was another claim set up in favor of certain individual orphans of said tribe for money which had been due the said orphans from the United States, but had never reached them on account of having been embezzled by the Indian agents. The Court of Claims allowed this item, but on appeal this judgment was reversed by this court, on the ground that at least a portion of the money had been paid to the guardians of the orphans, and that such payment released the United States from further liability. In so deciding this court took occasion to say in regard to these claims on behalf of the orphans that—

> It is by no means certain that under the acts of 1890 and 1892 the Shawnees were authorized to recover or collect from the Government any other moneys than those which were claimed in their tribal relations. The money in question is not due the tribe as such, but to certain individual orphans who claim to have been defrauded.

It is further true that this statute should be strictly construed, so far as a determination of the parties who are entitled to bring suit under it is concerned. This

follows from the fact that the jurisdictional statutes relied upon are statutes which authorize suits against the United States and are in derogation of the sovereignty of the United States. All statutes which take away any part of the inherent sovereignty of any government are subject to strict construction. This has frequently been held in the case of statutes that have authorized the States of the Union to be sued.

Rose v. *The Government* (24 Tex., 496). The statutes of Texas gave the right to sue the Government, or the State of Texas, to those who were authorized by the laws to commence suit against the President of the Republic of Texas, or against the Republic prior to the adoption of the State constitution. In determining who such parties were the court used the following language:

> The right to sue the governor or the State is a matter of favor conferred by the State in derogation of that immunity which every sovereignty enjoys, and we think that statutes conferring such privileges should be construed with strictness, so as to extend the right only to those by whom it was clearly intended that it should be enjoyed (p. 504).

Raymond v. *The State* (54 Miss., 562). The statutes of Mississippi allow suits to be brought against the State in much the same manner that the Federal statutes allow suits to be brought against the United States. In this case, however, it was held that a statute allowing set-offs did not apply to suits by the State against individuals, and such individuals could

not offset in such suits claims which they had against the State. The court said:

> It is admitted that a State can not be sued in its own courts, unless it has expressly consented to abrogate the prerogative of sovereignty and allow itself to be sued. A statute permitting such suits would be in derogation of its sovereignty and would be construed strictly. The rule on this subject was very clearly stated in *State* v. *Joiner*, 23 Miss., 500; *Parmilee* v. *McNutt*, 1 S. M., 197; *Josselyn* v. *Stone*, 28 Miss., 753.

In the case at bar it is sought to extend the right to sue to those who are not expressly mentioned in the jurisdictional statutes. Under the rules of construction above laid down such is not the meaning of these statutes.

NO CAUSE OF ACTION IS STATED.

If the court is of the opinion that the acts of 1890 and 1892 are sufficiently broad to allow claims on behalf of individual Indians, it is still true that the petition shows no cause of action against the United States in behalf of said individuals. Articles 11 and 14 of the treaty of May 10, 1854, and United States Revised Statutes, sections 2154, 2155, are stated in the petition to be the basis of the claims (p. 11). These statutes and treaty provisions have already been quoted. Article 11 of the treaty of May 10, 1854, provides for the payment to the Shawnee Indians of the sum of twenty-seven thousand dollars ($27,000), to be distributed upon proof made to the Shawnee

agent, and to be in full for all claims to the date of said treaty, arising out of damage, loss and destruction of property belonging to said individual Indians. If the claims proved should turn out to be more than twenty-seven thousand dollars ($27,000), they were to be paid *pro rata*. It is evident that this provision was simply for claims that accrued prior to the date of that treaty, and is a provision for their discharge in full. It is certain that no claims arising between 1861 and 1866, as the petition states these claims did arise, can be included within this article of the treaty. Article 14 of the treaty is equally devoid of any foundation for these claims; in it the Shawnees acknowledge their dependence upon the United States, and state that they will expect to be protected and have their rights vindicated. This article, however, can not be interpreted into an agreement to pay for all property that is stolen or destroyed by white citizens. These are the only treaty provisions anywhere mentioned as a foundation for this action. The two sections of the Revised Statutes quoted are equally devoid of any foundation for this action. They provide that when a white citizen is convicted of any offense within the Indian country, whereby the property of a friendly Indian is appropriated, such person shall be sentenced to pay the Indian the value of his property, and the next section provides that if such offender shall be unable to pay such amount, then the United States will pay it. It is not stated in the petition that any white persons were ever tried or con-

victed for the spoliation of any of the property claimed; consequently the above provision does not give any right of action. It is further provided in the last section that if such offender can not be apprehended and brought to trial, then the United States will pay the Indian the value of his property. It is not stated, however, in the petition that any effort was made to apprehend the parties guilty of the spoliation, nor that they could be convicted; consequently this provision will not help the claimant.

Furthermore, if it should be determined that the above suggestions are not insuperable obstacles to the maintenance of this suit, a reference to these jurisdictional statutes will show that the bar of the statute of limitation is not removed as to any claims, except those that arise out of treaty stipulations, and it is not removed as to those causes of action that might arise from the United States Statutes. It has been pointed out that these individual claims are certainly not covered by the act of 1890, and if covered by any act, it must be the act of 1892. The claims under the statutes, however just, can not be adjudicated under the act of 1892, even if that act may be extended to claims in favor of individual Indians, for it is confined to such claims "arising out of treaty relations of the United States, rights growing out of such treaties and from contracts expressed or implied under such treaties, made and entered into by and between the said Shawnees and Cherokees and between them, or either of them."

This certainly does not give jurisdiction to enter judgment for claims under sections 2154 and 2155 of the Revised Statutes, and such claims are barred.

The judgment of the Court of Claims should be affirmed.

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